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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 95

VICTOR LINKLETTER,

Petitioner,

vs.

VICTOR G. WALKER, Warden, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

TRUMAN HOBBS
EUEL A. SCREWS, JR.
Counsel for Petitioner

444 South Perry Street
P. O. Box 347
Montgomery, Alabama

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BRIEF FOR PETITIONER

Opinions Below

The decision of this Court denying petitioner's petition for certiorari to the Louisiana Supreme Court is reported at 370 U. S. 928. The majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit are reported at 323 F. 2d 11. The decision of this Court granting this petition for writ of certiorari is reported at ——U. S. ——, 84 S. Ct. 1340.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and by virtue of this Court's order entered May 18, 1964, granting petitioner's petition for a writ of certiorari, 84 S. Ct. 1340.

Statutes Involved

There are no statutes involved. The Fourth, Fifth and Section 1 of the Fourteenth Amendments to the Constitution of the United States are involved:

IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Where this Court has held that a state court conviction based on illegally obtained evidence violates the United States Constitution and, therefore, may not stand, can a state continue to hold in prison this petitioner whose conviction was obtained by such illegal evidence merely because his conviction became final before such holding by this Court?

2. Did this Court intend that relief from a conviction obtained in violation of a citizen's basic Constitutional rights, as defined in *Mapp* v. *Ohio*, be denied to a citizen who was deprived of such right prior to the date of such decision?

3. Does the decision of the Court below, denying to Petitioner the enforcement of the personal constitutional right defined in *Mapp* v. *Ohio*, for the sole reason that Petitioner's case was decided prior to the decision in *Mapp*, assign to petitioner and others similarly situated a lower constitutional status than that given to persons whose cases were decided after *Mapp* v. *Ohio*?

4. Does the decision of the Court below, in refusing to enforce the personal constitutional right to privacy in favor of petitioner solely because of the untimeliness of the deprivation of this right by the state, violate the Fifth Amendment to the Constitution of the United States?

5. Conceding only for argument that this Court intended *Mapp* to have prospective application, would not the fact that the illegal search in *Linkletter* (on August 24, 1958) occurred after the illegal search in *Mapp* (May 23, 1957) render it mandatory that the *Mapp* rule be given application to this case?

Statement of the Case

A burglary allegedly occurred in New Orleans on August 16, 1958. On August 24, 1958 after petitioner had been under surveillance for two days (R. 82-83) he was arrested without a warrant while walking on St. Charles Street near Canal in downtown New Orleans (R. 89).

The arresting officers, without arrest or search warrant, took from petitioner's person a key ring and five keys, including a key to his apartment (323 F. 2d 12; R. 6, 12-13). These keys were received in evidence as Exhibit S-27 in petitioner's state trial (R. 11). After the arrest, the officers kept petitioner in a parked police automobile for some time and then took petitioner into a vacant building while the officers searched the same. Petitioner was restrained by the officers and kept in custody some three hours before he was taken to police headquarters and charged (R. 10, 14, 15, 90). This vacant building was the place where the police physically searched and took the keys from petitioner's person (R. 12, 13). While petitioner was being charged at the police precinct (R. 7), police officers took the keys, went to petitioner's home at 930 Poydras Street, New Orleans, and entering the same by use of the keys made an extensive search (R. 18), seizing personal papers and property belonging to petitioner which admittedly had not been stolen (R. 18, 22). "Continuing in their defiance of the Law", 367 U. S. at 644, during the next two days the police searched petitioner's place of business on at least two occasions and again searched his house, each of these searches being without a warrant. Personal property was seized or taken during these searches and was introduced in evidence at petitioner's trial (R. 19-23, 71, 86-88). Admittedly the arrest and four searches of petitioner's home, person and place of business, and the seizure of his prop-

erty were made without warrant of arrest or search warrant (323 F. 2d at 12).

After the said three hour detention Petitioner was charged with four alleged burglaries (R. 6), but the charges were dropped by the District Attorney after three days (R. 8). After two more days of imprisonment, petitioner was charged on a conspiracy count (R. 8) and released on bond. On September 12, 1958, twenty days after the initial arrest, petitioner was charged with simple burglary of a bar at 134 Carondelet Street, the crime for which he was subsequently convicted (R. 5, 8, 99). The Police Major McNamara testified that the charge of simple burglary of the bar at 134 Carondelet Street had "nothing to do" with the "initial arrest" (R. 67). And the arresting officer thought petitioner was investigated for and booked on another suspected burglary (R. 90).

Therefore Petitioner, like Miss Mapp, was apparently convicted of a crime wholly unrelated to the original illegal search by the use of evidence discovered by such search.

The Fifth Circuit correctly held that "even under the State's version" the various searches of petitioner's apartment and place of business, without warrants and so far removed from the scene of arrest, were illegal (323 F. 2d 12), citing, *Agnello* v. *United States*, 269 U. S. 20, 30, among other authorities.

Petitioner was tried and convicted on May 28, 1959, 323 F. 2d 11. This was his first felony conviction. He received a 9-year sentence at hard labor, 323 F. 2d 11. Petitioner's subsequent appeal to the Louisiana Supreme Court was affirmed on February 15, 1960 and rehearing denied on March 21, 1960 (323 F. 2d at 11). The co-defendant, who was tried and convicted and sentenced to nine years along with petitioner, had his conviction reversed and was discharged by the Louisiana Supreme Court (R. 9).

Slightly over a year later, on June 19, 1961, *Mapp* v. *Ohio*, 367 U. S. 643, was decided. Immediately thereafter, petitioner filed a petition for habeas corpus in the Judicial District Court of the Parish of West Feliciana, Louisiana (323 F. 2d 11, 12). This petition was on the ground that petitioner's conviction resulting from admission of unconstitutional evidence must be overturned under the rule of *Mapp*. The writ was denied on December 8, 1961. Petitioner spent the next two years exhausting his state remedies, a fact conceded by the State of Louisiana (323 F. 2d at 12).

In the petition filed in the lower state court and in each subsequent petition and appeal petitioner has attacked the constitutionality of his conviction under the rule of *Mapp* (323 F. 2d at 12).

In the case below the Fifth Circuit met petitioner's contentions head on and held that since the introduction of the illegal evidence was timely objected to and since petitioner had exhausted state remedies:

> . . . the case before us squarely presents the issue of whether the rule in Mapp applies in a collateral attack on a pre-Mapp conviction (323 F. 2d at p. 13).

The Court held that *Mapp* should be limited to prospective application and, conscious of the split within the Circuits and among the state courts, observed:

> Ultimately, the solution must come from the Supreme Court. In the meantime, however, it is the obligation of the lower courts to endeavor to reach an authoritative, logical and just result. 323 F. 2d at p. 13.

Chief Judge Tuttle dissented (323 F. 2d at 19).

One further point should be mentioned. The illegal searches in this case occurred on August 24-26, 1958, al-

most a year *after* the illegal searches in *Mapp* on May 23, 1957 (367 U. S. at 644). The instant case and *Mapp* v. *Ohio* parallel the other factually, procedurally and constitutionally. They were about a year apart in the search and trial; the affirmance on appeal was about the same time (Mapp: 3/23/60; Linkletter: 2/15/60); both persons were convicted of crimes apparently wholly unrelated to the original search; both searches admittedly violated the Fourth Amendment; both persons were convicted primarily on illegal evidence seized in the searches. The Fifth Circuit apparently gave no weight to these facts. Petitioner believes that the only real difference between the two cases is that *Mapp* got to the Supreme Court first.

Summary of Argument

I. INTRODUCTION

In the three years since this Court's decision in *Mapp* v. *Ohio*, circuit courts have become hopelessly deadlocked in interpreting whether or not this Court intended *Mapp* to have prospective or retroactive application. Since this Court has applied *Mapp* with limited retroactivity in its decisions in *Ker*, *Fahy*, and *Stoner*, the lower court in the instant case and petitioner herein have defined the word "retroactive" to include only those decisions which became final prior to the decision of *Mapp*, viz: June 19, 1961. While the illegal search in petitioner's case occurred after the illegal search in *Mapp*, petitioner's conviction became final prior to the decision in *Mapp*.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG AND MUST BE REVERSED

(a) *The "Purpose" of Mapp*

The Fifth Circuit's opinion below rests in part on the premise that the "purpose" of the *Mapp* decision is to deter unlawful police misconduct and such purpose would not be served by affording this right, retroactively, to pre-*Mapp* prisoners. Petitioner maintains that this premise as applied by the Fifth Circuit is erroneous, and that the express language of the *Mapp* opinion makes it clear that a primary purpose for the decision is to protect a basic constitutional right not to be convicted on unconstitutional evidence.

(b) *The "Intent" of Mapp*

The Fifth Circuit held that this Court gave no indication of its intent as to whether *Mapp* should be applied retroactively or prospectively. Petitioner contends first, that this Court made it clear in *Mapp* that *Mapp* should be applied retroactively; second, that the post-*Mapp* decisions of this Court applying the exclusionary rule show retroactive application; and, third, that this Court has uniformly given "retroactive" application to other basic constitutional rights as enunciated by this Court.

(c) *Judicial Administration*

The Fifth Circuit held that orderly judicial administration called for prospective application, and more specifically that retroactive application would release presumably guilty prisoners. But the *Mapp* decision and other decisions of this Court make clear that the enforcement of fundamental constitutional rights cannot be sacrificed in the name of orderly judicial administration.

III. THIS CASE MUST BE REVERSED REGARDLESS OF THE DECISION IN THE RETROACTIVE VERSUS PROSPECTIVE CONFLICT

(a) *The Illogical Results*

Petitioner contends that since the petitioner's illegal seizure occurred *after* the illegal seizure in *Mapp*, a refusal to afford to petitioner the constitutional right enunciated in *Mapp* would make such deprivation dependent upon the docket load of the Louisiana appellate court. Petitioner states that this Court could not intend such illogic and injustice to result from the application of its decision in *Mapp*.

(b) *The Constitutional Barrier*

Petitioner contends the decision below must be reversed for the reason that the court below by refusing to protect petitioner's constitutional right to be free from unreasonable search and seizure denied due process under the Fifth Amendment.

ARGUMENT

I.

Introduction

Over three years have passed since this Court rendered its opinion in *Mapp* v. *Ohio*, 367 U. S. 643, holding that illegal evidence obtained in violation of the right to privacy rquirement of the Fourth Amendment is excludable in state prosecution by virtue of the Fourteenth Amendment. *Mapp* finally gave Fourteenth Amendment enforcement to Fourth Amendment rights. This length of time has proved sufficient for federal and state appellate courts to apply the

Mapp rule of exclusion to most of the possible chronological possibilities found in cases tried before June 19, 1961, the date of the *Mapp* decision.

The lower courts generally have defined the problem to be one of retroactive vs. prospective application of *Mapp*. The *Linkletter** opinion illustrates the hopeless deadlock between the various Circuits (and the States). Some four circuits and many legal writers and theorists have joined in the conflict since *Linkletter*.[1]

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* The *Linkletter* opinion, 323 F. 2d 11, is styled "United States ex rel. Linkletter v. Walker" and will be referred herein as "Linkletter" or *United States* v. *Walker*.

[1] The following is a chronological list of the Circuit Court decisions involving the retroactivity, *vel non*, of *Mapp*:

Fourth, Retroactive: *Hall* v. *Warden*, 313 F. 2d 483 (4 Cir. 1963). The *Hall* case was followed in *Walker* v. *Peppersack*, 316 F. 2d 119 (4 Cir. 1963).

Tenth, Prospective: *Gaitan* v. *United States*, 317 F. 2d 494 (10 Cir. 1963).

Fifth, Prospective: *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5 Cir. 1963). The *Linkletter* case was followed in *Reynolds* v. *United States*, 324 F. 2d 379 (5 Cir. 1963), where the Fifth Circuit refused to apply *Elkins* v. *United States*, 364 U. S. 206, retroactively to benefit a prisoner convicted on pre-*Elkins* "silver platter" evidence.

Ninth, Retroactive: *People of State of California* v. *Hurst*, 325 F. 2d 891 (9 Cir. 1963).

Third, Undecided: *United States* v. *Rundle*, 327 F. 2d 153 (3 Cir. 1964).

Seventh, Prospective: *Sisk* v. *Lane*, 331 F. 2d 235 (7 Cir. 1964).

Second, Prospective: *United States* v. *Fay*, 333 F. 2d 12 (2 Cir. 1964).

The following is a partial list of legal articles treating the subject of prospective vs. retroactive application:

Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 Geo. Wash. L. Rev. 193 (1963).

Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962).

It is important to define the terms "retroactive" and "prospective." The Fifth Circuit observed that the *Mapp* decision could not be considered purely "prospective" for the decision itself was applied retroactively to exclude the illegal evidence of the *Mapp* conviction. 323 F. 2d at 13. Furthermore, it cannot seriously be disputed that minimum fairness commands that *Mapp* be given retroactive application to set aside convictions founded on illegal evidence in cases pending on post-trial motions or on appeal at the time of the *Mapp* decision. This Court has resolved this question by applying the exclusionary rule of *Mapp* retroactively to three cases, *Ker*, *Fahy* and *Stoner*, having appeals pending on June 19, 1961.[2]

Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, Duke L. J. 319 (1962).

Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962).

Torcia and King, *The Mirage of Retroactivity and Changing Constitutional Concepts*, 66 Dick. L. Rev. 269 (1962).

Morris, *The End of an Experiment in Federalism—A Note on Mapp* v. *Ohio*, 36 Wash. L. Rev. 407.

Note, 16 Rutgers L. Rev. 587.

[2] In *Ker* v. *California*, 374 U. S. 23 (1963), the arrest was on July 27, 1960 and the case affirmed by the California Court of Appeals on August 29, 1961.

In *Fahy* v. *Connecticut*, 375 U. S. 85 (1963), the trial took place before the decision in *Mapp* but the conviction was affirmed after *Mapp*. *Connecticut* v. *Fahy*, 149 Conn. 577, 183 A. 2d 256 (1962).

In *Stoner* v. *California*, 376 U. S. 483, the search occurred on October 27, 1960 and the California District Court of Appeals affirmed on June 26, 1962, 205 Cal. App. 2d 108, 22 Cal. Rep. 718.

Before the event of the *Ker*, *Fahy* and *Stoner* decisions, most courts having considered the problem applied *Mapp* retroactively to cases on appeal. See, e.g., *State* v. *Smith*, 37 N. J. 481, 181 A. 2d 761 (1962); *Commonwealth* v. *Spofford*, 343 Mass. 703, 180 N. E. 2d 673 (1962); *People* v. *Loria*, 10 N. Y. 2d 368, 223 N.Y.S. 2d 462, 179 N. E. 2d 478 (Ct. App. 1961). But see *Commonwealth* v. *Mancini*, 198 Pa. Sup. 642, 184 A. 2d 279 (1962), where defendant was convicted on the date of the *Mapp* decision and the Pennsylvania Superior Court refused Mapp relief on direct appeal—relief was obtained by the grant of habeas corpus because of the "accident of time," *United States ex rel. Mancini* v. *Rundle*, 219 F. Supp. 549 (D. C. Pa. 1963).

Consequently, since we are only concerned with convictions which became final before the date of the *Mapp* decision, we will follow the example of the Fifth Circuit and "accordingly limit" our use of the terms, "prospective" and "retroactive." 323 F. 2d at 13. Under that definition the circuits are divided four: two: one in favor of prospective application.[3]

It immediately becomes apparent that those cases which became final before June 19, 1961 can be divided into two or perhaps three classes:

—those whose unconstitutional searches and seizures occurred *after* May 23, 1957, the date of the illegal seizure in *Mapp* (367 U. S. at 644);

—those whose unconstitutional searches occurred *before* May 23, 1957, but whose convictions became final *before* June 19, 1961;

—those whose unconstituional searches occurred *before* May 23, 1957, and whose convictions became final *before* May 23, 1957.

Petitioner's case falls in the first group—the unconstitutional seizure in his case occurred after the *Mapp* seizure. The time at which the decision in his case became final depended directly upon the docket load of the Louisiana Supreme Court. Had the Louisiana Court been derelict or tardy in its judicial business petitioner would have fallen into the class protected by *Ker, Fahy* and *Stoner*.[4] An important personal constitutional right should not be extinguished because of such fortuitous event.

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[3] The Fourth and Ninth appear to have held *Mapp* to be retroactive in all situations. The Third applied *Mapp* retroactively to a case on appeal at the time of the *Mapp* decision. The Second, Fifth, Seventh and Tenth have applied the decision prospectively to deny relief. See cases cited in note 1, *supra*.

[4] Cases cited, note 2, *supra*.

II.

The Fifth Circuit's Decision Is Wrong and Must Be Reversed.

In the opinion below, the Fifth Circuit denied to Victor Linkletter a personal constitutional right enunciated in *Mapp*. The right denied was the guarantee to be free from unreasonable searches and seizures. The right is one "basic to a free society," 367 U. S. at 656, and was held in *Mapp* to be "an essential part of the Fourteenth Amendment", 367 U. S. at 657. Nonetheless, the Fifth Circuit refused to enforce this right in favor of Linkletter for the sole reason that he was deprived of the right at a date sometime before the *Mapp* decision.

The Fifth Circuit's opinion seems based on three premises. (1) That the "purpose" of the *Mapp* decision is to deter unlawful police misconduct and such purpose would not be served by affording this right retroactively to pre-*Mapp* prisoners. (2) That this Court gave no indication of its intent toward the application of *Mapp*, leaving the circuits open to devise the basis of its application. (3) That orderly judicial administration calls for prospective application.

Petitioner respectfully submits that all three premises are erroneous, and that there is no justifiable reason to deny the *Mapp*-defined constitutional rights to Linkletter.

(a) *The "Purpose" of Mapp*

Notably the Fifth, Second and Seventh Circuits, in deciding to give only prospective application to the Constitutional Rule of *Mapp*, found that the clear "purpose of the exclusionary rule [was] to enforce the right of privacy as a deterrent," *United States* v. *Walker*, 323 F. 2d 11, 18 (5 Cir. 1963), or that the "principal reason" or "primary

purpose" behind the *Mapp* decision was "to deter police misconduct", *United States* v. *Fay*, 333 F. 2d 12, 17 (2 Cir. 1964) or that the *Mapp* decision was "limited to a deterrent purpose," *Sisk* v. *Lane*, 331 F. 2d 235, at 239 (7 Cir. 1964).

Petitioner has no quarrel with the observation that "deterrence" is one of the "purposes" of the exclusionary rule and a desirable one.[5] Petitioner does maintain that the three circuits are in clear error in focusing exclusive attention on deterrence. This Court's opinion in *Mapp* seemed to petitioner to make as clear as words could express that a primary purpose of *Mapp* was to assure that the individual is afforded due process of law and is not deprived of a personal constitutional right "basic to a free society."

This Court stated in *Mapp* that the right sought to be protected is "no less important than any other right carefully and particularly reserved to the people" 367 U. S. at 656. This Court stated that this right to be spared unconstitutional searches and seizures would be enforced against the states with the same strictness as it is enforced against the Federal Government in the same manner as are enforced the "rights of free speech and of free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession. . . ." 367 U. S. at 656. Failure to so enforce it would cause this right to "stand in marked contrast to all other rights declared as 'basic to a free society.'" 367 U. S. at 656.

Additional evidence that one of the primary purposes of *Mapp* was to enforce in favor of the individual citizen the personal constitutional right to privacy is *Mapp's* reliance

[5] This Court observed in *Mapp*, 367 U. S. at 656, a quote from *Elkins* v. *United States*, 364 U. S. 206, 217, that deterrence, in removing the incentive to disregard the constitutional right, will "compel respect for the constitutional guaranty."

on *Boyd, Weeks* and *Wolf* in defining the nature and scope of the right.[6]

Mapp expressly considered the right as one of "*personal* privacy", 367 U. S. at 657, quoting *Feldman* v. *United States,* 322 U. S. 487, 489, 490, and stating that *the least* this right, coupled with the Fifth Amendment, can "assure in

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[6] See Sections I and II of the *Mapp* decision.

Over seventy-five years ago this Court in *Boyd* v. *United States,* 116 U. S. 616, 630 (1886), noting that "the very essence of constitutional liberty and security" were at stake, held (116 U. S. at 630):

> It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of *personal* security, *personal* liberty and *private* property . . . (Emphasis added).

In *Weeks* v. *United States,* 232 U. S. 383, 392, it was again stated that the effect of the Fourth Amendment is to "forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law" and the use of evidence unconstitutionally seized was a "denial of the constitutional rights of the accused" (232 U. S. at 398). And in *Olmstead* v. *United States,* 277 U. S. 438, 463, this Court observed that "the well-known historical purpose of the Fourth Amendment . . . was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will."

The personal constitutional nature of the right to privacy was re-emphasized in *Wolf* v. *Colorado,* 338 U. S. 25, 27, 28, where this Court held:

> The security of one's privacy against arbitrary intrusion of the police—which is at the core of the Fourth Amendment—is basic to a free society.

In *Wolf* the Court made it clear that the right to privacy enjoyed no lower constitutional status than other basic constitutional rights; it enjoyed a place alongside the First Amendment guaranties such as freedom of speech, freedom of the press, or the free exercise of religion—this because the right to privacy was a right "implicit in 'the concept of ordered liberty' ". *Wolf* v. *Colorado,* 328 U. S. at 27, citing *Palko* v. *Connecticut,* 302 U. S. 319, 324, 325.

Although this Court, in *Wolf,* made it clear that the right to privacy was "enforceable against the states through the Due Process Clause," 338 U. S. at 27, 28, it refused to give a Fourteenth Amendment privilege to exclude illegal evidence as a "way of enforcing" this basic right. 338 U. S. at 28. As we read the decision, *Mapp* overruled *Wolf* in this regard and held that due process of the

either sphere is that *no man is to be convicted* on unconstitutional evidence" (Emp. added), 367 U. S. at 657. Finally this Court emphasized that "our decision . . . gives to the *individual* no more than that which the Constitution guarantees him" (Emp. added). 367 U. S. at 660.

The *Mapp* decision thus made clear that one of its basic purposes was to "reserve to *all* persons (Emp. added) as a specific guarantee" the "basic" right "to privacy free from unreasonable state intrusion", 367 U. S. 654. Nothing in the *Mapp* opinion suggests that Victor Linkletter should not be afforded this basic right the same as Mapp and others. The opinion below ignores this clear purpose of *Mapp*.

We agree with Judge Marshall's dissent in *United States* v. *Fay, supra,* 333 F. 2d at 23, that the majority of his court "by focussing almost exclusively on a supposed 'purpose' which it attributes to the exclusionary rule has obscured this basic point" that the "right not 'to be convicted on unconstitutional evidence,' is a fundamental ingredient of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States."

(b) *The "Intent" of Mapp*

The Fifth Circuit, in its opinion holding for prospective application, states that the "very *least* that could be said is that the [Mapp] opinion is not clear as to whether it

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Fourteenth required the enforcement of right to privacy against the states by the rule of exclusion, the same way as the right is enforced against the Federal Government. Therefore, *Mapp* made the exclusionary rule "an essential part of the Fourteenth Amendment," 367 U. S. at 657, and gave to citizens a constitutionally enforced right of privacy as against both the Federal and State governments.

We note that this Court through Chief Justice Hughes held long ago that the Fourteenth Amendment's search prohibition should be "liberally construed" in favor of the "individual." *Sgro* v. *United States,* 287 U. S. 206.

should be given retroactive effect."[7] We strongly disagree and state that the *Mapp* opinion is quite clear that this Court intended retroactive effect. This position is strengthened when post-*Mapp* decisions *of this Court* are examined. And it should be remembered that this Court has never allowed a newly enunciated constitutional decision to be applied except with complete retroactivity.

Petitioner realizes the irony in arguing to this court what this court meant in a recent opinion. The intent of that opinion is clearly expressed, however, and Petitioner maintains, with deference, that the Fifth Circuit utterly failed to heed its mandate that the constitutional right of privacy must be enforced indiscriminately, as other such rights, whether the citizen was deprived of it before or after the magic date of the *Mapp* decision.

Footnote 9 of the *Mapp* opinion and its supporting text makes this clear (367 U. S. at 659):

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 NY, at 21, 150 NE, at 587. In some cases this will undoubtedly be the result.[9] But, as was said in Elkins, "there is

[9] As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns* v. *Ohio*, 360 U.S. 252, 3 L ed 2d 1209, 79 S.Ct. 1164, *Griffin* v. *Illinois*, 351 U.S. 12, 100 L ed 891, 76 S.Ct. 585, 55 ALR 2d 1055, and *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 100 L ed 126, 76 S.Ct. 223. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

[7] *United States* v. *Walker*, note 1, *supra*, 323 F. 2d at 15.

another consideration—the imperative of judicial integrity." 364 U.S. at 222. The criminal goes free, if he must, but it is the law that sets him free.

To what could the footnote and supporting text refer than to problems concerning the effect of releasing pre-*Mapp* prisoners? If this Court intended *Mapp* to be only prospectively applied, the phrase ". . . the class of state convictions possibly affected by this decision" would not make sense—there would be no *class* of *convictions* affected by the decision. Likewise the comparison with *Burns, Griffin* and *Herman*, and particularly *Griffin's* retroactivity, would be a useless act—these three decisions could "affect" state convictions "only if they were given retroactive effect."[8]

We observe that this Court significantly did not limit *Mapp* to future operation "as it might have done."[9]

Mr. Justice Harlan in his dissent (joined by Justices Frankfurter and Whittaker) discussed the "untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf* . . ." 367 U. S. at 676. This dissent shows beyond dispute that these three Justices considered the majority opinion to have retroactive application.

We also note Justice Harlan's dissent in the per curiam disposition of the series of cases beginning with *Pickelsimer* v. *Wainwright*, —— U. S. ——, 11 L. ed. 2d 41, 42 (1964), where he again pointed to the retroactive nature of *Mapp*:[10]

[8] Judge Marshall, dissenting in *United States* v. *Fay, supra*, 333 F. 2d at 23.

[9] *Hall* v. *Warden, supra*, 313 F. 2d at 496. It has been noted that it could "be argued with a good deal of force" that this "void in the opinion" clearly "intended retroactive effect." *Torcia & King*, note 1, *supra*, at 275, 276.

[10] We note that this dissent appeared after the Fifth Circuit's opinion below.

> When this Court is constrained to change well-established constitutional rules governing state criminal proceedings, as has been done here and in other recent cases . . . it seems to me that the question whether the States are constitutionally required to apply the new rule *retrospectively*, which may well require the reopening of cases long since finally adjudicated in accordance with then applicable decisions of this Court, is one that should be decided only after informed and deliberate consideration. . . . Nor do I believe that the circumstance that Gideon was decided in the context of a state collateral proceeding rather than upon direct review, as were the new constitutional doctrines enunciated in Mapp and Ker, forecloses consideration of the *retroactivity* issue in this instance. (Emp. added.)

The clearest "proof" of retroactive application next to the language of the *Mapp* opinion is "in the pudding" and we refer to *Ker, Fahy* and *Stoner*.[11] All three cases were pre-*Mapp* convictions, and this Court retroactively applied the *Mapp* exclusionary rule to each to test the constitutionality of alleged illegally seized evidence. The seizure and the trial in Petitioner's case, like *Ker, Fahy* and *Stoner*, took place before the decision in *Mapp*. The only temporal difference between the four cases was that the latter three were pending on appeal on the date of the *Mapp* decision, June 19, 1961:

	Illegal Seizure	*Affirmance Date*
Ker—	July 27, 1960	October 25, 1961
Fahy—	February 1, 1960	June 26, 1962
Stoner—	August 27, 1960	June 26, 1962
Linkletter—	August 16, 1958	February 15, 1960
Mapp—	May 23, 1957	March 23, 1960

[11] Note 2, *supra*.

The retroactive applications of *Ker*, *Fahy* and *Stoner* must dictate similar application to Linkletter.[12] Otherwise, a premium is placed on judicial delay or tardiness—Linkletter would have been benefited had the Supreme Court of Louisiana been further behind on its docket.

In addition to the *Mapp* decision and her offspring, what do the decisions state in regard to "other basic rights secured by the Due Process Clause" which *Mapp* held are *"enforceable in the same manner and to like effect"*, 367 U. S. at 660 (Emp. added)? In other words, how has this Court enforced "other basic rights" in factual situations occurring at a date before the right was defined by this Court? We submit that other than the decision of the Fifth Circuit and its three sisters there have been no exceptions to the rule that constitutionally protected rights are enforced in favor of a citizen deprived of such right, irrespective of the fact that such deprivation may have occurred before or after such right was defined. The following are a few examples of such enforcement:

Eskridge v. *Washington*, 357 U. S. 214, granted to a prisoner serving under a 1935 conviction the right not to be deprived of appellate review because of poverty, and thereby applied retroactively the 1956 decision of *Griffin* v. *Illinois*, 351 U. S. 12, which defined such right. This was done over the strong "prospective" argument of respondent[13] and over the dissent of Justices Harlan and Whittaker that the "Griffin case, decided in 1956, should not be applied to this conviction occurring in 1935. . . ." 357 U. S. at 216.

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[12] *Fahy* and *Stoner* were not decided at the time the Linkletter case was written. However, the court in Linkletter cited and promptly distinguished *Ker*. 323 F. 2d at 13.

[13] The State of Washington argued as the first proposition in its brief that "The decision in *Griffin* v. *Illinois* should be limited to a prospective application." Brief for Resp. p. 12.

Last year the Court again indicated that *Griffin* would have been applied retroactively, this time to a 1941 conviction, but for the death of the reporter, among other things. *Norvell* v. *Illinois*, 373 U. S. 420 (1963).[14] Mr. Justice Goldberg joined by Mr. Justice Stewart in dissenting observed (373 U. S. at 425):

> Griffin was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments.

Recently this Court reversed a 1959 plea-of-guilty conviction on the basis of the 1963 constitutoinal right to counsel requirements of *Gideon* v. *Wainwright*, 372 U. S. 335. *Doughty* v. *Maxwell*, 376 U. S. 202. And in the past year this Court has entered dozens of per curiam orders reversing pre-*Gideon* convictions, orders which obviously enforce retroactively the right to counsel requirements of *Gideon*.[15] It is significant that the Circuits and some state courts have had no trouble in applying *Gideon* retroactively.[16]

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[14] In *Norvell* petitioner's 1941 transcript was unavailable in 1961 because of the death of the reporter. Norvell had an attorney and did not seek appeal after trial. The Court held that the state did not have to furnish a record under these circumstances. Justices Goldberg and Stewart dissented on the grounds that the Illinois Supreme Court interpreted *Griffin* prospectively and not retroactively in the sense that *present* and not *past* financial barriers to appeal are protected.

[15] E.g.: On April 22, 1963, this Court vacated and remanded "for further consideration in the light of Gideon v. Wainwright" some eighteen cases involving claims of no counsel in pre-*Gideon* convictions, 372 U. S. 766, 770, 773-782; again on June 17, 1963, another eleven cases were similarly reversed, 374 U. S. 488, 494; and on October 14, 1963 eleven more, —— U. S. ——, 11 L. Ed. 2d 41, 42.

[16] For example see: *Perez* v. *St. of N. Y.*, 223 F. Supp. 336 (S. D. N. Y. 1963); *U. S. ex rel. Craig* v. *Myers*, 220 F. Supp. 762 (E. D.

Of particular significance is the posthumously published opinion of the late Judge Clark, adopted as the opinion of the Second Circuit, sitting *en banc*, in the case of *U. S.* v. *LaVallee*, 330 F. 2d 303, 312 (1964). The opinion was prepared prior to this Court's per curiam decision in *Doughty* v. *Maxwell, supra*, 376 U. S. 202. The question, of course, was whether a pre-*Gideon* defendant, convicted without counsel on a plea of guilty, should receive *Gideon* relief retroactively. Judge Clark stated:

> We do not deal here, however, with considerations of *res judicata* and vested rights, but with the question whether, consonant with our society's conceptions of due process and general constitutional law, we could deny the constitutional right enunciated in Gideon to those who happened to be tried before the decision was handed down. Thus to hold would be to assign a lower constitutional status to pre-Gideon prisoners who were denied the right to counsel, a right so 'fundamental and essential to a fair trial' that it is made obligatory upon the States by the Fourteenth Amendment to the United States Constitution; a right that has been characterized by the Court as a 'basic minimal' right vouchsafed by the Constitution, Rideau v. Louisiana, 373 U. S. 723, 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663. There is no question that such prisoners were subjected to an unfair trial. The only question is whether we will deny them relief. We do not believe that our constitutional standards would permit such a denial.

Pa. 1963); *Jones* v. *Cunningham*, 319 F. 2d 1, 5 (4 Cir. 1963); *Striker* v. *Pancher*, 317 F. 2d 780 (6 Cir.—Dictum); *Johnson* v. *Crouse*, 224 F. Supp. 864, 867 (D. C. Kan. 1964). See *Gideon* v. *Wainwright*, 153 So. 2d 299 (Fla. 1963) on remand.

Further significant evidence that this Court intended retroactive applications for pre-*Mapp* situations are the recent decision of *Fay* v. *Noia*, 372 U. S. 391 (1963), dispensing with some of the preservation of federal question requirements of *Daniels* v. *Allen*, 344 U. S. 443 (1953), and the companion case of *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963), holding, *inter alia*, that the prisoner need not have asserted his constitutional rights in the state hearing if he "was unaware of the significance of relevant facts." These cases certainly open the procedural doors for pre-*Mapp* prisoners to challenge the constitutionality of the evidence which convicted them.[17] Likewise, we believe that cases such as *Reck* v. *Pate*, 367 U. S. 433, holding the release of a 1937 prisoner because of involuntariness of a confession, are material to the instant case when standards set forth in recent cases are used retroactively to test the confession.[18]

The many decisions of this Court, many decided before the opinion below, even in the absence of the *Mapp* language and the three subsequent *Mapp* decisions, clearly indicate by uniform precedent this Court's intent to apply retroactively all Fourteenth Amendment rights so that no

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[17] See Wolf, 32 Geo. Wash. L. Rev., note 1, *supra*, at 231, 232.

[18] Judge Marshall dissenting in *U. S.* v. *Fay*, note 1, *supra*, 333 F. 2d at 24, noted that: "In Reck v. Pate, 367 U. S. 433, the court ordered the release of Reck, a prisoner convicted in 1937, when it found that the circumstances of obtaining a confession were inherently coercive in the light of such cases as *Blackburn* v. *Alabama*, 361 U. S. 199 (1960); *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Fikes* v. *Alabama*, 352 U. S. 191 (1957) and *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949), all of which were decided many years after Reck's trial. Indeed, the District Court which held a hearing on Reck's petition recognized, that under the present-day standards expounded in the above and other cases, the confession would have to be excluded, but declined to apply those cases retroactively. See United States ex rel. Reck v. Ragen, 172 F. Supp. 734, 747 (N. D. Ill. 1959)."

citizen will suffer an arbitrary deprivation of his constitutional rights.

The holdings of the Circuits prospectively applying *Mapp* have effectively assigned to Linkletter and others like him "a lower constitutional status." *United States* v. *LaVallee*, *supra*, 330 F. 2d at 312. The effect of these holdings is a refusal to enforce a fundamental constitutional right in favor of a citizen because the state deprived him of the right before this Court had declared such right.

The decisions of these Circuits which apply *Mapp* only prospectively frustrate the *Mapp* decision and its designed "intent" or "purpose" in another way. This Court examined at length the "double standard recognized until today" which helped create the "needless conflict between state and federal courts", and noted that the "essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." 367 U. S. at 657-658. The opinion rang with the necessity of uniformity of treatment of persons subjected to unreasonable searches and seizure. The Fifth Circuit and other circuits applying *Mapp* prospectively have now introduced a new lack of uniformity and a new arbitrary difference as between pre-*Mapp* and post-*Mapp* prisoners.

The decision below thus violates the spirit of the *Mapp* decision which sought to give uniform, logical application of the protections of the Constitution, necessary in the true administration of justice.

(c) *Judicial Administration*

In the opinion below, the Fifth Circuit, supported by several law review articles[19] agreed that perhaps retroactive

[19] The articles cited by the Court include the Yale and Rutger's notes, and the Bender and Traynor articles, note 1, *supra*.

application would "place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent [which] would be to invite needless disruption in the administration of justice." [20] And the Court stated (323 F. 2d at 19):

> We conclude that whatever slight deterrent effect, if any, *Mapp* might have if applied retroactively is insufficient to warrant the release of all of these presumably guilty prisoners.[11]

Footnote 11 to the above holding reads (333 F. 2d at 19):

> It should be pointed out that this decision is not merely based on the great administrative burden which would be placed on the courts should *Mapp* be applied retroactively, for prisoners as well as tort claimants have a right to crowd court dockets. Instead, this decision is based on the fact that such litigation would fail to serve the purpose for which the right was created.

This Court clearly crossed this bridge of releasing "all of these presumably guilty prisoners" [21] in the *Mapp* decision. This Court stated:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the con-

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[20] *United States* v. *Walker*, 323 F. 2d at 19, quoting Traynor, Duke L. J. at 341, 1962, note 1, *supra*.

[21] The record shows that Victor Linkletter has vigorously maintained his innocence. We will not join issue with the observation that innocent persons were never convicted under the pre-*Mapp* rule because such is not necessary to this appeal. We will observe the ironical fact, however, that apparently neither Miss Mapp nor Victor Linkletter was convicted of the crime which was the subject of the illegal search—they were both innocent of the originally suspected offense.

stable has blundered." People v. Defore, 242 NY, at 21, 150 NE, at 587. In some cases this will undoubtedly be the result.[9] But, as was said in Elkins, "there is another consideration—the imperative of judicial integrity." 364 U. S. at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

The Fifth Circuit's quoted administrative holdings are completely opposed by this portion of the *Mapp* decision. Not only in *Mapp*, but in other decisions this Court has made it clear that neither enforcement of fundamental constitutional rights nor the respect for judicial integrity can yield to independent evidence of guilt.[22]

Obviously this Court was not impressed with the "wholesale release" argument in its rulings on pre-*Gideon* cases and obviously the *Gideon* decision will affect many more prisoners than *Mapp*. The same observation has been made of *Fay* v. *Noia*, 372 U. S. 391.[23]

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[22] See for example, *Rogers* v. *Richmond*, 365 U. S. 534; *Haynes* v. *Washington*, 373 U. S. 503; *Reck* v. *Pate*, 367 U. S. 433.

[23] Judge Marshall, dissenting in *United States* v. *Fay*, note 1, *supra*, at 26.

Although our position is that a respect for the Constitution requires a new trial for Linkletter and others similarly situated, we cannot agree with the Fifth Circuit's fear of prisoner release. Rather, we submit that the number of cases which ultimately may result in new trials under retroactive application is infinitesimally small. See *Wolf*, note 1, *supra*, at 217, 233; *Torcia and King*, note 1, *supra*. District Judge Tyler in *United States* v. *Fay*, 225 F. Supp. 677 (S. D. N. Y. 1963), rev'd, 333 F. 2d 28, observed that the opening of the prison gates argument required a "pessimistic appraisal of the methods of police and prosecutors."

We submit that the Fifth Circuit (and the legal articles cited by the Fifth Circuit) erroneously failed to recognize the foundation of the *Mapp* exclusionary rule as being a personal fundamental constitutional right *of an accused*—rather the Court and its supporting articles treat the *Mapp* constitutional right as though it were a rule of evidence, or at most a statutory command.

Victor Linkletter has admittedly been denied a fundamental constitutional right by the State of Louisiana. The Fifth Circuit refuses to enforce that right in his favor. That decision must be reversed and the "individual", Victor Linkletter, must be given "that which the Constitution guarantees him." 367 U. S. at 660.

III.

This Case Must Be Reversed Regardless of the Decision in the Retroactive Versus Prospective Conflict.

(a) *The Illogical Results*

This Court did not intend *Mapp* to be applied to give illogical results—its constitutional relief should not depend upon "trivial events." [24]

Assuming for argument only that this Court did not intend the constitutional right defined in *Mapp* to be applied to all pre-*Mapp* cases, the right surely must be afforded to Linkletter who was deprived of his right *after* Miss Mapp

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[24] *United States* v. *LaVallee*, 330 F. 2d 303, 310, note 4, stating: ". . . Do the rights of prisoners tried during the summer of 1961 depend on whether they were tried during, before, or after Gideon's trial—or his arrest—or his sentencing? Or perhaps the alleged date of the crime is critical. Against such casuistry we hasten to add our simple point: Constitutional rights should not depend on arcane logic or trivial events."

was deprived of hers. We submit that *any* withholding of the *Mapp* right to pre-*Mapp* prisoners could be based only on the exigency of the case of the fortuity of time and would result in a capricious deprivation of the right—for stronger reasons—if the constitutional application is withheld to Linkletter, his rights have become dependent upon the docket load of the Louisiana courts. A slower docket would have meant that Linkletter would have fallen within the factual situations of *Ker, Fahy* and *Stoner*. This fact was not recognized, or was ignored, by the Fifth Circuit. If there must be a cut-off date for *Mapp's* retroaction, the only logical date would be where all "relevant" factors happened before the seizure in *Mapp*. Otherwise, as observed in *Hall* v. *Warden*, 313 F. 2d at 496:

> . . . is the conviction so impregnable to collateral attack that the law is justified in exacting the death penalty from Hall because his trial and appeal were pushed along while it is possible that others who may have obtained delays may be tried by a different yardstick?

We do not think this Court intended *Mapp* to be construed to result in a lower decision holding that "although an illegal search in Ohio vested the victim in 1957 with a constitutional privilege to exclude, such a search in . . . [Louisiana] did not vest the victim with such a privilege in 1959, and that although a trial in Ohio in which illegally obtained evidence was admitted was constitutionally vitiated, a later trial in . . . [Louisiana] in which such evidence was admitted was not constitutionally vitiated." [25]

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[25] *People of State of California* v. *Hurst*, note 1, *supra*, 325 F. 2d 891, 895.

(b) *The Constitutional Barrier*

Notwithstanding this Court's language in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940), and *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364, we believe that a very serious constitutional barrier prevents the selective or prospective application by the judiciary of a personal constitutional right. Neither *Chicot* nor *Sunburst* involved or discussed the judicial withholding of the benefit of personal constitutional rights from an individual citizen. The distinction is clear and, we submit, basic. We challenge respondent to cite a case where this Court has even intimated, much less held, that a newly defined constitutional right (or remedy) should be the subject of selective, prospective application. Rather, as has been shown the cases from this Court enforcing constitutional rights are unanimous in retroactive application. We believe and submit that the decision of the Fifth Circuit, refusing to apply a constitutional right, itself denies Petitioner the right of Due Process under the Fifth Amendment.

CONCLUSION

Petitioner respectfully requests this Court to enter its decision, reversing the opinion below and afford to Petitioner his long-denied Constitutional rights defined in *Mapp* v. *Ohio*.

Respectfully submitted,

TRUMAN HOBBS
EUEL A. SCREWS, JR.

Of Counsel:

GODBOLD, HOBBS & COPELAND
444 South Perry Street
P. O. Box 347
Montgomery, Alabama

Certificate of Service

I hereby certify that I have served a copy of the foregoing brief on Honorable Jack P. F. Gremillion, Attorney General of the State of Louisiana, by mailing such copy, postage prepaid, to him, addressed to him at State of Louisiana, State Capital Building, Baton Rouge, Louisiana, the 1st day of September, 1964.

EUEL A. SCREWS, JR.